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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EARL DOUGLAS,

Defendant and Appellant.

F069667

(Super. Ct. No. SC065430A)

OPINION

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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James Douglas appeals from the denial of a petition for recall of sentence and resentencing under the Three Strikes Reform Act of 2012, also known as Proposition 36. Douglas claims the trial court erred by finding him unsuitable for relief on grounds that

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his release from prison would pose an unreasonable risk of danger to public safety. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992, at the age of 21, Douglas was convicted of three counts of first degree robbery with personal use of a firearm (Pen. Code,[1] §§ 211, 212.5, subd. (a), 12022.5, subd. (a)). These convictions resulted in a six-year prison sentence, which he began serving in approximately February 1993. California's Three Strikes law was enacted the following year, whereupon individuals convicted of any felony offense after having suffered two prior convictions for serious or violent felonies were subject to a mandatory minimum prison term of 25 years to life. (Stats. 1994, ch. 12, § 1, p. 71, codified at former § 667, subds. (b)–(i); former § 1170.12, subd. (c)(2), added by Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994).)

In 1995, a correctional officer found Douglas in possession of two-tenths of a gram of marijuana. He was prosecuted and convicted of violating section 4573.6 (possession of a controlled substance in prison) and sentenced to 25 years to life under the Three Strikes law. In 1998, Douglas was found guilty of violating section 4502 based on the discovery of a weapon inside of his prison cell and was sentenced to an additional two-year term. He is not eligible for parole until 2025.

Proposition 36 was passed into law by the electorate in November 2012. In August 2013, Douglas petitioned the Kern County Superior Court for relief pursuant to section 1170.126, the statute that governs resentencing under Proposition 36. The matter was heard and ruled upon in June 2014. Evidence submitted by the parties in support of and opposition to the petition, including Douglas's own testimony, revealed the following information.

[1] All further statutory references are to the Penal Code.

Douglas sustained two juvenile adjudications for vehicle taking and continued to violate the law in his early adulthood. He suffered a vehicle taking conviction around the time of his nineteenth birthday and was convicted of threatening a witness (§ 140) at age 20. A year later, he pleaded guilty to a charge of assault with a deadly weapon (§ 245, subd. (a)(1)) and was on probation when he committed the armed robbery offenses that landed him in prison.

While incarcerated, Douglas ascended the organizational hierarchy of a prison gang known as the Black Guerilla Family. He testified to achieving the status of "captain," which made him one of the highest ranking members of the gang. Douglas also accumulated a large number of disciplinary infractions, particularly during the years 1996 through 2002, as memorialized in California Department of Corrections and Rehabilitation form 115 (CDC 115) rules violation reports. He was the subject of at least twenty-two CDC 115 investigations within that time period and was found to have committed battery on an inmate with serious injury; battery on an inmate without serious injury (x 3); battery on a peace officer; possession or manufacture of a deadly weapon; possession of a weapon; possession of dangerous contraband; delaying a peace officer (x 5); threatening a staff member; and engaging in conduct that could lead to violence.

Douglas's behavior improved significantly in the eight-year period spanning 2003 to 2011. He was cited for only two CDC 115 violations during that stretch of time: refusing to obey an order in August 2006 and destruction of state property valued at less than $50 in December 2008. In approximately May 2008, Douglas disassociated from the Black Guerilla Family and began the process of "debriefing," i.e., disclosing to prison officials insider information regarding the gang's operations and its members. He later joined Alcoholics Anonymous and Narcotics Anonymous, completed a 13-week course on anger management, and enrolled in general education classes. By 2011, Douglas had obtained a General Educational Development (GED) certificate and was officially validated by the CDC as a "dropout," i.e., a former gang member.

In 2012, Douglas continued to show positive development by involving himself in the Education, Diversion, and Goals to Endeavor (EDGE) youth diversion program for at-risk children and minors. However, he also incurred four additional CDC 115 violations. He was found guilty of fighting with an inmate in April 2012 and again in September 2012, though he later described the incidents as involving "mutual combat" and denied being the initial aggressor on either occasion. His other violations were for failing to report to a work assignment. In January 2013, Douglas was again cited for failing/refusing to report to a work assignment.

The trial court denied the petition for resentencing in a written decision filed on June 23, 2014. The order states, in pertinent part, "The court finds that the People have met their burden that the Petitioner would pose an unreasonable risk of danger to the public safety. The court has considered all aspects of the information and evidence presented, including but not limited to Petitioner's in-custody behavior, which supports a denial of the petition, notwithstanding that the Petitioner debriefed from the Black Gorilla [sic] Family about four years ago." Douglas filed a timely notice of appeal.

DISCUSSION

Standard of Review

Enacted as part of Proposition 36, section 1170.126 allows a defendant who was previously sentenced to life in prison for a nonserious and nonviolent felony under the Three Strikes law to file a petition for resentencing on the predicate conviction. (§ 1170.126, subd. (b).) The petitioner has the initial burden to demonstrate eligibility for relief, which is objectively determined by the nature of his or her third strike offense and other prior felony convictions. (*Id*., subd. (e); see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336 ["The eligibility determination … is not a discretionary determination by the trial court."].) Upon a showing of eligibility, "the petitioner shall be resentenced [as a second strike offender] unless the court, in its discretion, determines

that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

"[T]he People have the burden of proving, by a preponderance of the evidence, facts on which a finding that resentencing a petitioner would pose an unreasonable risk of danger to public safety reasonably can be based. Those facts are reviewed for substantial evidence." (*People v. Buford* (2016) 4 Cal.App.5th 886, 903-913, review granted Jan. 11, 2017, S238790 (*Buford*).) However, "a trial court need not determine, by a preponderance of the evidence, that resentencing a petitioner would pose an unreasonable risk of danger to public safety…. Nor is the court's ultimate determination subject to substantial evidence review. Rather, its finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within 'the bounds of reason, all of the circumstances being considered.' " (*Id.* at p. 901.)

Finding of Unreasonable Risk of Danger to Public Safety

Preliminarily, we address Douglas's contention that the words "unreasonable risk of danger to public safety" as used in section 1170.126, subdivision (f) must be interpreted pursuant to section 1170.18, subdivision (c), which is a provision enacted by the Safe Neighborhoods and Schools Act (Proposition 47) that defines the exact same phrase as meaning "an unreasonable risk that the petitioner will commit a new violent felony" described in section 667, subdivision (e)(2)(C)(iv). The enumerated offenses, colloquially known as "super strikes," include rape, sexual abuse of children and minors, various homicide offenses, possessing a weapon of mass destruction, and any other serious or violent felony punishable by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv)(I-VIII); *People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.)

Douglas asserts his statutory interpretation claim to preserve it for further review, acknowledging that the majority of appellate districts, including ours, have rejected the position he is advocating. (E.g., *Buford, supra,* 4 Cal.App.5th at pp. 910-911 [Fifth District]; *People v. Myers* (2016) 245 Cal.App.4th 794, 801-805 [Third District], review

granted May 25, 2016, S233937; *People v. Guzman* (2015) 235 Cal.App.4th 847, 853-857 [Fourth District], review granted June 17, 2015, S226410; *People v. Davis* (2015) 234 Cal.App.4th 1001, 1021-1026 [First District], review granted June 10, 2015, S225603.) The issue of whether Proposition 47's definition of "unreasonable risk of danger to public safety" applies in Proposition 36 proceedings is pending before the California Supreme Court in *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825. Under the current prevailing view, trial courts have broad discretion to determine whether an otherwise eligible petitioner is suitable for resentencing under Proposition 36. We will follow our District's precedent in that regard.

In exercising its discretion to grant or deny a Proposition 36 petition, the trial court may consider "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) Any other evidence the court … determines to be relevant…." (§ 1170.126, subd. (g).) The assessment must focus on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 746 (*Esparza*).) As with parole suitability determinations, "the passage of time … and the attendant changes in a prisoner's maturity, understanding, and mental state … [are] highly probative to the determination of current dangerousness." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1219-1220 (*Lawrence*) [discussing standard applicable in parole proceedings]; *Esparza*, *supra*, 242 Cal.App.4th at p. 746, citing *Lawrence* at p. 1214 and *In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255.)

Since the order appealed from is presumed correct, we must view the record in the light most favorable to the trial court's ruling. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.) "The area of discretion is that in which reasonable minds might differ."

(*People v. Johnson* (1974) 38 Cal.App.3d 228, 248.) Reasonable minds could certainly differ with respect to the trial court's conclusion in this case. The court was evidently unmoved by Douglas's rehabilitative achievements and stated desire to pursue community service and youth outreach endeavors upon release from prison. What appears to have tipped the scales for the judge below is Douglas's two CDC 115 violations for fighting in 2012, which arguably suggested a continuing propensity for violence despite commendable progress in other areas of his life. In light of the current standard for discretionary assessments of dangerousness under section 1170.126, we cannot say the trial court's ruling is "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Disclosure of Douglas's Mental Health Records

During a hearing conducted on October 3, 2013, the trial court noted its receipt of files containing Douglas's mental health records from prison. When the deputy district attorney confirmed that she had subpoenaed those records, the trial court said, "As my standard practice, I'm going to turn the mental health records over to the People over the defense objection." Three months later, the People filed an opposition to the petition, which included approximately 450 pages of exhibits. Exhibit "SS" to the opposition is a single-page excerpt from a collection of "Mental Health Interdisciplinary Progress Notes" and contains handwritten notes prepared by a psychologist on or about February 4, 1997. The author of the document references Douglas's "past [history] of assaultiveness" and notes: "manipulative statements made, 'I might snap' and 'I might go off on my cellie.' " The author had a suspicion that Douglas made those statements in hopes of obtaining prescription drugs or "special housing" accommodations. The document also contains the acronym "ASPD," which the deputy district attorney interpreted as meaning "anti-social personality disorder."

During the June 11, 2014 hearing on the petition for resentencing, Douglas was asked on cross-examination if he had any "mental health issues." He replied, "I struggle

with depression like people would doing time and stuff and stress here and there, but that's about it." The deputy district attorney later asked, "What if I told you I had a record that said anti-social personality disorder?" Douglas responded, "I seen something about that. That's because when I was housed in the SHU, I shut down. When they had me isolated, I'm the only one in the pod and I'm a member of a gang and they got me in with nothing but Mafia members and Aryan Brotherhood. I didn't -- they didn't associate with me. … I don't expect nothing from them and they didn't expect nothing from me. I think that's the time where they diagnosed me with anti-social disorder."

On appeal, Douglas contends that the trial court violated his constitutional right to privacy under state and federal law by providing his mental health records to the People over his attorney's objection. We agree with the People that Douglas put his mental health at issue by petitioning for relief under Proposition 36, and thus find no grounds for reversal. As previously discussed, section 1170.126 authorizes the trial court to consider any evidence it determines "to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (*Id*., subd. (g)(3).) "While normally an inmate would have a medical privilege not to have psychological records disclosed, likely the privilege would be deemed waived by the filing of a petition under section 1170.126. Certainly the psychological history of an inmate can have a direct bearing on the issue of dangerousness."[2]

[2] Couzens & Bigelow, The Amendment of the Three Strikes Sentencing Law (May 2016) § IV.C.4., p. 74 <http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf> [as of May 19, 2017].

DISPOSITION

The order denying resentencing pursuant to section 1170.126 is affirmed.

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GOMES, Acting P.J.

I CONCUR:

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SMITH, J.

PEÑA, J., Concurring

In *People v. Buford* (2016) 4 Cal.App.5th 886 (*Buford*), this court unanimously agreed the definition of dangerousness, if applicable to Proposition 36 (the Three Strikes Reform Act of 2012) cases, does not apply retroactively. (*Buford*, at p. 913, fn. 28; *id.* at pp. 918-920 (conc. opn. of Peña, J.).) Since the newly enacted definition of dangerousness does not apply retroactively to this case, and because defendant James Earl Douglas has failed to show the trial court abused its discretion in denying his petition for resentencing, the judgment requires affirmance.

I write separately because it appears the court in this case is rejecting Douglas's contention on the ground Penal Code section 1170.18, subdivision (c) does not mean what it says: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667." For the reasons stated in my concurring opinion in *Buford*, I cannot endorse a view that does violence to the plain meaning rule, unless such a meaning is repugnant to the general purview of the act, or for some other compelling reason. (*People v. Leal* (2004) 33 Cal.4th 999, 1007-1008.) The majority in *Buford* did not attempt to show the plain meaning of the language used was repugnant to the act. Further, it did not even offer or suggest a compelling reason to ignore the rule.

In light of this, although I concur in the judgment, I cannot sign the opinion of my colleagues until further guidance from our Supreme Court.

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Peña, J.